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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 279

HIGHLANDER FOLK SCHOOL, *et al.*

v.

STATE OF TENNESSEE *ex rel.* A. F. SLOAN, District Attorney General, 18th Judicial Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Petitioner, Highlander Folk School (hereafter "Highlander"), prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee in the above entitled case ordering the revocation of petitioner's charter and the extinction of its corporate existence.

OPINIONS BELOW

The opinion of the Circuit Court of Grundy County, Tennessee, is unreported. It appears in Appendix A hereto at p. 10a. The opinion of the Supreme Court of Tennessee is reported at 345 S.W. 2d 667, and appears in Appendix A at p. 1a. The judgment of that Court

appears in Appendix A at p. 8a. The opinion and judgment of the Supreme Court denying petitions for rehearing appear in Appendix A at p. 8a.

JURISDICTION

The opinion and judgment of the Supreme Court of Tennessee were filed on April 5, 1961 (R. 1822, 1832). A timely petition for rehearing was denied by that court on May 5, 1961 (R. 1859). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the court below, in holding that the activities of petitioner, a racially integrated adult school, had violated state law and warranted the forfeiture of petitioner's charter, after a trial in which the trial court had refused to excuse jurors who on *voir dire* expressed their prejudice against petitioner and had permitted the introduction of evidence irrelevant to the issues and calculated solely to inflame the already demonstrated passions of the jurors, did not so far depart from applicable rules of state law and from its own precedents as to deny to petitioner due process of law and equal protection of the laws in violation of the Fourteenth Amendment.

2. Whether the trial court, in ordering the revocation of petitioner's charter on the ground that petitioner had violated state law forbidding the operation of integrated private educational institutions, deprived petitioner of due process of law and of equal protection of the laws in violation of the Fourteenth Amendment, and whether this Court is precluded from consideration of that question when the court below purported to sustain the judgment of the trial court on other grounds, when those grounds are insubstantial.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. That Amendment in pertinent part provides:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was chartered by the State of Tennessee in 1934 as a general welfare non-profit corporation (R. 60). The charter application recited that (R. 61):

> "The particular purpose for which this Charter is sought is for the support of Highlander Folk School, adult workers education, the training of rural and industrial leaders, and general academic education."

Highlander was then and is now located in a rural area in Grundy County, Tennessee (R. 789). During the 1930's Highlander engaged primarily in training labor leaders and young workers in the utilization of rights accorded them by the then recently passed National Labor Relations Act (R. 793, 1510, 1560, 1650). Following World War II, the school's activities shifted from the labor field to the area of racial problems (R. 1505), and since that time the activities of the school have been primarily the promotion by education of a fuller participation of Negroes in the political, economic and social life of the South (R. 809-811, 822). In the course of these efforts Highlander has operated on a fully racially integrated basis (R. 47, 103).

Highlander's policy of racial integration in time drew the attention of the Legislature of the State of Tennessee. In 1959 the Legislature passed a resolution calling for an investigation of Highlander. House Joint Res. No. 30, Pub. Acts Tenn. (1959), p. 1091. A Legislative Committee appointed pursuant to this resolution held a series of open and closed hearings at which attention was focused almost exclusively upon the fact that the school operated on an integrated basis, a state of affairs which the Committee's witnesses apparently deemed to be plain evidence of subversion.

On March 6, 1959 the Committee filed a report with the Legislature criticizing the interracial activities carried on at the school, alleging that these activities were subversive, and recommending a legislative resolution instructing the District Attorney General to institute suit for revocation of Highlander's charter. The Legislature duly passed such a resolution. Sen. Joint Res. No. 47, Pub. Acts Tenn. (1959), p. 1235; R. 110.[1]

The Attorney General thereupon instituted suit against Highlander, seeking simultaneously an injunction on the ground that Highlander was operating as a nuisance and a forfeiture of Highlander's charter for allegedly illegal activities. The bill alleged: (1) that Highlander was operating in violation of certain compulsory segregation statutes of Tennessee (see T.C.A. 49-3701); (2) that lewd and immoral conduct consistently took place on Highlander's property: (3) that Highlander had engaged in the sale of

[1] The statutes of the State of Tennessee make it mandatory for the District Attorney General to proceed with a quo warranto proceeding when directed to do so by the General Assembly. See T.C.A. 23-2809.

beer without a license in violation of Tennessee law; and (4) that Highlander had been operated for the personal profit of its President, Myles Horton (R. 7-12, 90-93). Highlander's answer admitted that it operated on an integrated basis, and alleged that to forbid such operation would violate the Fourteenth Amendment. It denied the other charges in the bill and asserted that they were merely a pretext to seek to penalize Highlander for its racial activities (R. 36-58, 98-105).

On September 14-16, 1959, the Circuit Court of Grundy County, sitting without a jury, heard evidence on the charges of immoral conduct and unlawful sale of beer. It found no support for the first of these charges, but held that Highlander had made unlawful sales of beer by reason of the fact that it had had for a time a "revolving fund" by which it made beer available on a non-profit basis to persons connected with the Institution (R. 1735).[2] On the basis of its holding, the court granted the State a temporary injunction, ordering the padlocking of one of the buildings on Highlander's grounds. (R. 1735)

Some 45 days thereafter, in November 1959, the quo warranto aspects of the case came on for hearing before a jury (R. 189). Because the issues as to immoral conduct and as to the legality of petitioner's "revolving fund" for beer had already been adjudicated by the court, and because the integrated operation of the school was admitted and hence posed no issue of fact, the only question to be submitted to the

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[2] The use of this "revolving fund", and the availability of beer on Highlander's premises, had been discontinued more than a year prior to the bringing of the action for reasons altogether unrelated to its lawfulness (R. 723, 1507, 1511, 1512, 1588).

jury was whether Highlander had been operated for the personal profit of its President, Myles Horton (R. 131, 974).

During the selection of jurors it became readily apparent that Highlander was not to receive the fair trial by an unbiased jury to which it was entitled under the Fourteenth Amendment and that the true issue in the minds of the Court and jury alike was not that ostensibly before them but rather simply whether an integrated educational institution, such as Highlander, should be permitted to operate in rural Tennessee. A large number of jurors were excused because they stated that they had made up their minds that Highlander should be closed down.[3] A number of jurors, however, who likewise on the *voir dire* stated categorically that in their opinion an integrated institution such as Highlander should not be permitted to operate,[4] were eventually, after some effort

[3] For example, the first juror called testified on voir dire as follows:

"Q. And you have heard it said and you yourself believe that no Negroes should be allowed on the mountain?
"A. Yes sir." (R. 240-241)

See also R. 282, 287, 292-293, 330, 343, 346-348, 359, 364-366, 375, 390, 425, 435-436.

[4] Among the answers elicited on voir dire from jurors subsequently seated over petitioner's objection was the following:

Juror Medley:

"Q. Do you think and is it your belief, that Negroes and white people should attend the same classes together?
"A. Well, I don't think so." (R. 251-252)

Juror Smartt:

"Q. Are you opposed in your thinking to whites and Negroes attending the same classes?

at their rehabilitation by the court with extremely leading questions (R. 255, 269, 281, 287, 300, 302-306, 311, 313, 323, 369, 387, 389, 393, 397, 456), seated over the objection of Highlander (R. 252, 255, 260, 267, 269, 306, 314, 320, 329, 362, 414, 446, 452, 475). Thus at the outset of the trial Highlander, on trial for its corporate life, was deprived of the unbiased finder

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"A. Well, that is the law, I reckon. I don't favor that myself.

"Q. You are not in favor of it? You don't believe in it, do you?

"A. No, sir." (R. 267)

Juror Thompson:

"Q. And if there is a school where whites and Negroes attend the same class room, you think that it shouldn't be permitted to exist. Is that right?

"A. Well, I don't think they should mix. That is all I know." (R. 322)

Juror Walker:

"Q. I'm asking you, if it is your opinion, your opinion and your abiding conviction that any place where that occurs should not be permitted in this country?

"A. Well, I wouldn't want to." (R. 362)

Juror Hargis:

"Q. You have an opinion that you wouldn't do it? You don't think it is right, do you, Mr. Hargis?

"A. Do you mean integration?

"Q. Yes sir.

"A. No, I don't." (R. 414)

Juror Layne:

"Q. Do you have any settled opinion or abiding conviction that white and Negro people should not be permitted to attend classes and mixed group or sit side by side in lectures and things of that nature?

. . . . .

"A. Well, my own personal opinion as you know, I have never been used to it." (R. 452)

of fact guaranteed to it by the due process clause of the Fourteenth Amendment.[5]

During the course of the hearing the denial to Highlander of its constitutional right to a fair trial continued. Despite the fact that neither the question of racial integration at Highlander nor the alleged sale of beer without license were before the jury for decision, the court, over Highlander's objection, permitted the State to introduce a mass of material, in the form of testimony, photographs, etc., largely relating to integrated dancing, eating and study on the Highlander premises, which was demonstrably irrelevant to any issue before the jury for decision, and inescapably designed and calculated solely to arouse and inflame the already demonstrated passions of the jury.[6]

With respect to the issue as to "personal gain" tendered to the jury for decision, the basic reliance of the State was on the fact that in 1958 Highlander had conveyed to its President, Myles Horton, certain land and a house which had been constructed thereon (R. 9). Highlander proved, without contradiction, that this

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[5] Highlander had theretofore exhausted the three peremptory challenges permitted it under Tennessee law on prospective jurors who displayed on *voir dire* such a deep and clear bias that Highlander was plainly entitled to have them excused for cause (R. 316, 329).

[6] These exhibits consisted of photographs (R. 695-698) showing Negroes and whites, attending classes together, eating together, dancing together, and in general, socializing together. They also consisted of a number of "Tickets" showing delivery of beer to Highlander's campus (R. 523, 528, 660-671). In addition thereto, the Attorney General was permitted to read testimony of persons in regard to the presence of Negroes and whites at Highlander together, and the presence of beer on the campus (R. 660-689; 692-707, 711-731).

conveyance had been made after a careful study by a special committee appointed by the governing body of Highlander and was in recognition of more than 20 years of service by Myles Horton as President with no compensation beyond subsistence for himself and his family (R. 43, 789-790, 792, 795, 798-802, 814, 835, 850, 1505). Petitioner also proved that it was in excellent financial condition (R. 503, 878), its assets having increased from approximately $2,000 in 1934 to some $175,000 by the time of trial (R. 494, 812, 815; Exh. 1, 2, 3), and that the house conveyed to Mr. Horton had been constructed almost entirely with personal funds of his late wife (R. 799, 815, 817-819, 854, 911). On these facts the jury, after the very briefest deliberation (R. 1025), returned a verdict holding that Highlander had been operated for the personal profit of its President.

The court thereupon ruled (R. 128-138) that Highlander's charter should be forfeited: (1) because it had sold beer in violation of State law; (2) because it had been operated for Myles Horton's personal profit; and (3) because its operation as an integrated institution was unlawful under Tennessee law.

Petitioner appealed to the Supreme Court of Tennessee,[7] urging, *inter alia*, that its right under the due process and equal protection clauses of the Fourteenth Amendment had been denied by the failure of the trial court to follow controlling state precedents which established that the handling of beer and the dealings between Horton and Highlander were altogether lawful

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[7] Petitioner's appeal is contained in its printed "Assignment of Error, Brief and Argument," a copy of which is found at p. 1739 of the Record.

and proper, and that this discriminatory application of state law had inescapably been done because Highlander was racially integrated. Petitioner alleged also that the sanction decreed by the court—that of charter revocation—was wholly unauthorized by and specifically contrary to state law even were Highlander to be assumed to have violated state law in the respects charged. Highlander claimed also that its rights under the due process clause of the Fourteenth Amendment had been infringed by the denial to it of a fair and unbiased jury, and by the repeated admission of masses of wholly irrelevant and prejudicial evidence. Finally, Highlander challenged the constitutional validity of the Tennessee statute requiring segregation in educational institutions.

The Tennessee Supreme Court affirmed the holdings of the court as to beer sale and "personal profit". It did not purport to overrule, and indeed did not even discuss, prior Tennessee cases relied upon by petitioner as demonstrating the legality of its conduct, nor did it deal with petitioner's contention that charter revocation was unauthorized under Tennessee law as a sanction for the challenged activities of Highlander, even assuming those activities to be unlawful. The court, in a patent effort to avoid correction by this Court of its denial to Highlander of that institution's constitutional rights, held that it was unnecessary to pass upon the validity of the Tennessee segregation statute.

The constitutional issues presented by this petition were raised for the first time in petitioner's answer in the Circuit Court. There Highlander asserted it was being deprived of "Constitutional rights and civil liberties primarily because it conducted an integrated

educational institution." (R. 47). The answer further asserted that the revocation of petitioner's charter because of its integrated character would violate the due process clause of the Fourteenth Amendment (R. 99) and deny to petitioner the equal protection of the laws guaranteed by that Amendment (R. 100, 103, 105, 224).

In the motion for a new trial by Highlander, it asserted that the action of the jury and the trial court "constituted deprivation of rights guaranteed * * * by the 14th Amendment to the Constitution of the United States." (R. 172).

On appeal, Highlander asserted (R. 1739) that its constitutional rights had been violated by the trial court by its denial of a fair and impartial jury, and by the unequal application of the law by that court, and that the revocation of its charter by the trial court because of its integrated operation was "in contravention of defendant's rights under the * * * Fourteenth Amendment to the Constitution of the United States." After the decision by the State Supreme Court, and on the petition to rehear, Highlander asserted that the State Supreme Court violated these constitutional rights in affirming the action of the trial court and jury (R. 1840).

REASONS FOR GRANTING THE WRIT

This is the first case in the long history of the State of Tennessee in which the charter of *any* corporation has been revoked by the courts. It presents an unmistakable picture of discriminatory application of state law by state action in order indirectly to forbid the exercise of constitutionally protected rights which the

state is powerless to reach directly. It stands as a warning to any who would challenge the segregationist traditions of Tennessee that they will be subjected to harassment by the full power of the state, and will be treated as a class apart in the application to them of state law. This warning has not gone unheeded.[8]

Highlander does not contend that it is exempt from the laws of the State of Tennessee simply because it happens to be a racially integrated institution. Rather, it asserts no more than that it is entitled to be judged according to the same principles of Tennessee law that are applicable to other bodies corporate and that the equal protection and due process clauses forbid the courts of Tennessee to apply to it rules of purported Tennessee law designed for it alone, either as ostensible grounds to justify the most severe possible kind of punitive action against it or as a device that seeks to frustrate review by this Court of the only ground for punishment that finds support in this record, namely, that petitioner's integrated operations were contrary to the segregation laws of the State of Tennessee.[9]

The evidence as to the method by which beer had been for a time dispensed at Highlander to personnel there is essentially uncontradicted. Highlander pur-

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[8] See *Minutes of the General Assembly, Cumberland Presbyterian Church*, 1960, at p. 105, wherein the Board of Trustees of Bethel College unanimously reported that integration of that college should be deferred until this case was determined. The Report is attached hereto as Appendix B.

[9] The unconstitutionality of these laws is so plain on their face, see, *e.g.*, Brown v. Board of Educ., 347 U.S. 483; Shelley v. Kraemer, 334 U.S. 1, that petitioner believes it unnecessary to argue the point further.

chased beer with a "revolving fund" as a service to its personnel (R. 1511, 1587). This beer was available in a room on the school premises where items such as candy, razor blades, cigarettes and the like were also available (R. 722). A staff member, student, or guest of the school could take a can of beer as he wished, and put some money in a box provided for that purpose which in turn became part of the "revolving fund" (R. 722, 820, 1511-13). No profit was realized on these transactions, and in fact the system operated at a loss (R. 722). This activity had been voluntarily discontinued about a year before the complaint by the State (R. 723, 1507, 1511, 1512, 1588).

The Supreme Court of Tennessee has had occasion in the past to determine whether conduct of this sort violates the criminal or nuisance statutes of the state, and has uniformly and explicitly held that it does not. In *Moriarty* v. *State*, 122 Tenn. 440, 124 S.W. 1016 (1909), an indictment against an employee of a general welfare non-profit corporation for "selling intoxicating beverages" was dismissed on the grounds that his activity was a service provided for the members of the corporation and was not a sale or carrying on of commercial activities as understood under the law. The court said (122 Tenn. at pp. 443, 451, 453, 124 S.W. at pp. 1016-1017, 1019):

> "Thus it has been held that in one class of the cases that a bona fide social club, organized for the purpose of establishing a library in connection with a club room for social enjoyment, may serve its members and their invited guests intoxicating liquors, the members only paying therefor, the money so received being used to replenish the stock, but insufficient for that purpose, without

being liable to pay license required of retail liquor dealers. . . .

". . . Not only is this record without suggestion that there was a profit made in the disposition of the liquor in this Elks Lodge, which was carried into a 'general fund' to be used as might be in defraying the expenses of the club; but the fact is that no profit was made, the price charged for the liquor served being the simple equivalent of its price and the cost of serving the same to the members.

"We are satisfied from the uncontroverted facts in the record that the Knoxville Lodge of Elks, like the present lodge, is a bona fide association, organized for social, fraternal, and benevolent purposes, and that the furnishing of refreshments, inclusive of intoxicants, to its members, is purely incidental, and that the lodge was not engaged in the 'handling of liquor for sale' within the sense of the revenue act of 1907."

A few years later, in *State ex rel. Whittaker* v. *Mountain City Club,* 136 Tenn. 102, 188 S.W. 579 (1916), the Supreme Court reaffirmed its position that conduct of the kind here involved does not constitute commercial activities or a "sale". Indeed, it expressly recognized that the citizens of Tennessee were entitled to rely upon this interpretation of the Tennessee law in ordering their personal affairs. In sustaining the dismissal of a nuisance suit, the court stated (136 Tenn. at pp. 113, 116; 188 S.W. at p. 582):

"It is insisted that the fact of selling at a profit is really immaterial, and we are asked to reconsider these cases. *These cases have long been among our published decisions, and the people of the State have acted in view of them, and it would not be right to disregard them, defining, as they*

> *do, the privileges of the people in respect to personal conduct, involving the difference between crime and freedom from crime, with respect to the particular question involved.* . . . So, in the case before us, under the facts, the question really is whether the defendant was engaged in carrying on the business of a retail liquor dealer. If it was, it was guilty of committing a nuisance. If it was not so engaged, but was obeying the principles laid down in the cases of Tennessee Club v. Dwyer and Moriarty v. State, it was not guilty of committing a nuisance. It was obeying these principles and is not guilty." (Emphasis added)

There have been no decisions by the Supreme Court of Tennessee during the half century since the *Moriarty* case which have modified or changed the rules there laid down. Even in the present case, the Supreme Court of Tennessee did not purport to overrule these decisions. It simply ignored them. This case falls squarely within the principle long ago stated by this Court in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 374:

> "No reason for (the discrimination) is shown, and the conclusion cannot be resisted that no reason for it exists except the hostility to the race and nationality to which the petitioner belongs and which in the eyes of the law is not justified. The discrimination is therefore illegal and the public administration which is enforcing it is a denial of equal protection of the law and in violation of the 14th Amendment to the Constitution."

The facts upon which the jury found that Highlander had been operated for the personal profit of its President have already been stated. As has been shown above (pp. 5-8) this finding was fatally infected by the fact that it was rendered by a jury several members of which had candidly admitted their prejudice against petitioner, in a trial at which petitioner's constitutional

rights were persistently disregarded by unwarranted introduction of evidence which had no relevance to the issue ostensibly being tried and which was plainly designed to further inflame the jury to petitioner's prejudice. See *Irvin* v. *Dowd*, 6 L. ed. 2d 751; *In re Murchison*, 349 U.S. 133. As in *Irvin*, the record inescapably demonstrates a community "pattern of deep and bitter prejudice", and shows that throughout the proceedings "the buildup of prejudice is clear and convincing." Accordingly, the judgment rendered as a result of those proceedings is constitutionally invalid.

Apart from this fatal defect, the drastic sanction of charter forfeiture invoked by the courts of Tennessee on the basis of the findings was without support in and indeed was directly prohibited by controlling Tennessee law and thus worked a denial to petitioner of the equal protection of the laws.

On the "personal profit" branch of its case, the State proceeded under T.C.A. 23-2817. As to relief in a case where officers of a corporation have been found to have diverted its assets, that section provides:

> ". . . (I)n the event the Court should find that the corporation, its stockholders, directors, officers or managers have intentionally impaired or depreciated its assets or property for the purpose of preventing the corporation from effectively discharging its duty to the public,[10] the property of the corporation shall escheat to the state *unless* its stockholders, directors, officers or managers, within a reasonable period fixed by the court, restore to the treasury of the corporation a sufficient amount of money or property to enable it to effectively dis-

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[10] It was agreed to and stipulated to by the parties that the school was operating within the confines of its charter (R. 970) and the Court so found (R. 136).

charge its duty to the public; and also that the corporation, its directors, or managers, as the case may be, pay the costs."

Under the Tennessee law, where, as in Section 23-2817, a statutory remedy is provided with respect to any violation of law, that and only that remedy may properly be decreed by the court. See *Bailey* v. *Union National Bank*, 159 Tenn. 659, 121 S.W. 2d 393 (1929). This settled rule of Tennessee law was, like petitioner's other contentions as to the applicable state law, simply ignored by the court below.

In the long course of Tennessee jurisprudence, the courts of the State have never in any quo warranto proceeding revoked the charter of a corporation, but rather have followed and applied less drastic remedies on the ground that they suffice to correct the illegality. Even the most flagrant violations by corporations of their charter provisions have never resulted in the extinction of corporate existence as decreed in this case. See *State ex rel.* v. *Family Loan Co.*, 167 Tenn. 654, 73 S.W. 2d 167 (1934); *State ex rel.* v. *Retail Credit Men's Ass'n*, 163 Tenn. 450, 43 S.W. 2d 918 (1931); *State ex rel.* v. *Southern Publishing Co.*, 169 Tenn. 257, 84 S.W. 2d 580 (1935). Thus even if the State be assumed, contrary to fact, to have established the illegality of Highlander's operations in the respects charged, the sanction decreed in itself constituted a denial to petitioner of the equal protection of the law.

As a citizen of the State of Tennessee, Highlander is entitled to equal treatment under state law with every other Tennessee corporation, except to the extent that there are differences between it and other corporations of which the state may properly take cognizance within the limits of the Federal Constitution. On this record

it is clear that Highlander is unique only in the fact that it is racially integrated. It requires no citation of authority to establish that this difference between Highlander and other corporations may not, consistent with the Fourteenth Amendment, be relied upon by the State as a basis for the invidious treatment of Highlander under state law.

From the foregoing it is evident that the genesis of the proceedings against petitioner, and the true reason for the judgment rendered against it, was what the trial court held to be the illegality of its integrated operations, and that the "state grounds" ostensibly relied upon by the court below were merely make-weights designed to insulate this patently insupportable constitutional adjudication from further review. More than half a century ago Mr. Justice Holmes, speaking for an unanimous Court, unequivocally recognized the duty of this Court under these circumstances in words remarkably apposite to the instant case:

> "[W]e cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction [of a corporate charter] more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute & I.R.R.* v. *Indiana ex rel. Ketcham*, 194 U.S. 579, 589.[11]

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[11] This is but one expression of a long-recognized principle which was recently applied to prevent an effort by a state supreme court to evade review by this Court of a substantial federal constitutional claim in circumstances not unlike those here presented. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449. See also Gelpcke v. City of Dubuque, 1 Wall. 175, 207 ("we shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice"); Note, The Untenable Nonfederal Ground, 74 Harv. L. Rev. 1375.

CONCLUSION

This case is one more of a sorry series in which state courts have, in derogation of their constitutional obligation, sought to evade the command of the Fourteenth Amendment that all persons similarly situated are entitled to identical treatment under law regardless of race. To permit the ready evasion of this constitutional mandate by the discriminatory manipulation of state law, and in a proceeding where the finders of fact are plainly determined to end by whatever means may be at hand a situation which challenges local segregationist custom, would be to deny the very concept of government under law.[12]

For the foregoing reasons the petition for a writ of certiorari to the Supreme Court of Tennessee should be granted.

Respectfully submitted,

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August 1961

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[12] This case particularly merits the close scrutiny of this Court because at stake is the very existence of what is concededly a bona fide educational institution. Compare Sweezy v. New Hampshire, 354 U.S. 234.

APPENDIX A

Filed April 5, 1961- B. J. Boyd, *Clerk Supreme Court*

Opinion of the Supreme Court of Tennessee

State of Tennessee, *ex rel.*, A. F. Sloan, District Attorney General

v.

Highlander Folk School

Grundy Law

Hon. Chester C. Chattin, Judge

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South Pittsburg, Tennessee	Nashville, Tennessee

Opinion

This suit was commenced by the State through General Sloan, District Attorney General, seeking to have the charter of defendant revoked and the corporation dissolved. At a hearing as to the proposition that the school was operated for the personal and private gain of the operator, Horton, the issue was submitted to a jury and that body answered the issue in the affirmative.

There were two hearings on this matter, one in September 1959, relative to the nuisance aspect of the petition and another one in November 3, 1959, and it was there that the Constitutional question of operating an integrated school was considered and passed upon by the trial judge.

It might be said here that the trial judge was of the opinion that the cases of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and *Roy* v. *Brittain*, 201 Tenn. 140, (1956) had no application here because the school in question in this record is a private and not a public school.

At this hearing the Court agreed with the findings of the jury that this school was operated for the personal and private gain of Myles Horton, and that large quantities

of beer were possessed and sold promiscuously to the students as well as the teachers, many of the students being minors, and these many sales of beer were all made without a license.

It is also in evidence that large stacks of beer cans, whiskey jugs and bottles were found about the school. Many exhibits appearing in the record show revolting and inexcusable conduct carried on at this school.

At many of their entertainments beer was sold without a license, and in many cases to minors. It must be borne in mind that the selling of beer without a license in Tennessee is against our criminal law and it is especially exacting as to the sale of beer to minors.

The above were the holdings of the trial judge on this quo warranto proceedings as to the nuisance feature of the case.

On the 20th day of October, 1934, Highlander Folk School was granted a general welfare charter of incorporation by the State of Tennessee, under the provisions of T.C.A. 48-1101 et seq. The particular purposes for which it was incorporated were declared in its charter Technical Record Vol. 1, page 13, to be:

> "The particular purposes for which this charter is sought are the support of the Highlander Folk School, adult workers education, the training of rural industrial leaders, and general academic education."
>
> And
>
> "The general welfare of society, not individual profit, is the object for which this charter is granted, and hence the members are not stockholders in the legal sense of the term, and no dividends, or profits shall be divided among the members. The members may at any time voluntarily dissolve the corporation by a conveyance of its assets and profits to any other corporation holding a charter from the State for the purposes not of individual profit. T.C.A. 48-1110"

And

"The means, assets, income or other property of the corporation shall not be employed, directly or indirectly, for any other purpose whatever than to accomplish the legitimate object of its creation, and by no implication shall it possess the power to issue notes, or currency, deal in currency, notes, or coin, or sell products, or engage in any kind of trading operation, or hold any more real estate than is necessary for legitimate purposes." T.C.A. 48-1109.

The Charter also provides:

"A violation of any of the provisions shall subject the corporation to dissolution at the instance of the State."

T.C.A. 48-1109 also provides the following limitations and restrictions:

"The means, assets, income or other property of the corporation shall not be employed, directly, or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation, and by no implication shall it engage in any kind of trading operation, or hold any more real estate than is necessary for its legitimate purposes."

In *State ex rel* v. *Junior College*, 166 Tenn. 535, only an injunction was there sought, yet the Court went at length to construe the quo warranto statute with reference to its proper application and said:

"We think a suit like the one before us may be brought either to enjoin a corporation from the doing of a particular thing, or to procure the forfeiture of the corporation's charter, as the circumstances of the case requires."

See *State* v. *Kansas City College of Medicine* (Mo. S. Ct.) 46 A.L.R. 1472.

Summarizing the evidence in the Missouri case the Court finally stated its conclusions as follows:

> "The evidence summarized above justifies the conclusion that Dr. Alexander conducted the school solely for his own private gain."

The proof here shows, as found by the trial jury and the trial court, that the school was operated for the private gain of Myles Horton.

The trial court as to the first question involved that is, did Myles Horton operate the school for his own personal gain, had this to say:

> "As to the first question this court is satisfied with the verdict of the jury. The preponderance of the proof is to the effect that Myles Horton was conveyed some 70 acres of land with valuable improvements upon it by the defendant, Highlander Folk School. That he handled all the money in the school, that although Miss May Justus was the secretary and treasurer of the school, she did not write checks, or handle the money, or any of the finances of the school. The President, Myles Horton handled the finances of the defendant. He wrote all the checks; or designated some one when he was away to write the checks. He reared a family on defendant's property and all the expenses of taking care of himself and family and household servants, throughout some 25 years were paid out of defendant's funds."

Horton testified that during the first years of the school he put everything into the building of the school with the idea of getting it out of the school at some later date.

Horton testified that for the past few years he had been drawing a salary of some $9,000.00 annually. However, he was unable to produce any record of the directors or executive committee having fixed his salary. The inference is that he fixes his own salary.

There isn't any proof that the governing officers of defendant, school, have ever protested any of the acts of Horton in this illegal operation of the school.

The charter of defendant provides:

> "The general welfare of society, not individual profit, is the object for which the charter is granted, and the members are not stockholders, in the legal sense of the term and no dividends, or profits, shall be divided among them. . . ."

This statute does not authorize a corporation to convey its property to one of its officers on the pretense it is conveying it to him for a back salary. Defendant had no right to let Horton live upon this property for 25 years without paying taxes, then give it to him.

The charter of the defendant further provides:

> "A violation of any of the provisions of this charter shall subject the corporation to dissolution at the insistence of the State."

See *State ex rel.* v. *Family Loan Co.*, 167 Tenn. 654; 13 Am. Jur. Sec. 1318, p. 1176.

The operation of this school for the personal gain of Horton was a misuse and abuse of its powers, and perversive of the objects for which it was created and injurious to the public. It is needless to say that under the scheme of operation as used by Horton, he evaded the payment of taxes.

It should be borne in mind that this issue was submitted to the jury, that is, whether Horton operated this school for his personal gain, and this finding was in all respects approved by the trial court.

In these two findings by the jury and the court, we fully concur.

This brings us to a consideration of the second proposition and that is the sale of beer by the defendant on its premises without a permit and license, was a wilful and intentional act and in direct violation of the express provisions of its charter in that it could not engage in any

trading operations, and it was a violation of the criminal laws of the State as well as the nuisance statute.

We refer to the testimony of Mrs. Hazel May Thomas, R. Vol. 2, page 523 as follows:

"Q. Now, I will ask you, Mrs. Thomas while on these occasions and on the premises whether or not, you have seen intoxicating beverages?

A. Yes, sir.

Q. Where did you see them?

A. In a place where they sold beer and candy and stuff—cold drinks, P.X. like.

Q. Did they have what they call a P.X.?

A. Yes, sir.

Q. What building was that in?

A. It was in the old school building.

Q. You say they sold beer there?

A. Yes, sir.

Q. Do you know how much they sold it for?

A. No, sir.

Q. Did you or anybody buy any?

A. Yes, sir.

Q. Do you know how much it cost?

A. No sir, I don't.

Q. Did you see any whiskey?

A. Yes, sir.

Q. Where did you see it?

A. At the Highlander Folk School and Myles Horton's house.

Q. How much did you see at the school building?

A. It would be in gallon jugs and quart bottle—,

Q. Gallon jugs and quart bottles?

A. Yes, sir."

On this point we now call attention to the testimony of Mrs. Dosie Church, R. Vol. II, page 546, who testified that she was employed at this School for a number of years.

"Q. Did you see any alcoholic beverages stored there in the building property?

A. Yes, sir, I have.

Q. Have you seen much?

A. Well, what do you call much?

Q. Well, you describe what you saw, Mrs. Church?

A. Well, I have saw it in bottles on the shelf. I don't know whether you call it storing it or not, but just on a shelf, and I have saw the bottles when they would be empty in the garbage cans. I have carried them out a number of times.

Q. Have you seen any jugs there?

A. I went in one morning and the table was full of gallon jugs of whiskey.

Q. Now, Mrs. Church, if you know, what else have you seen them sell there besides beer and whiskey?

A. Well, I have saw them sell chewing gum and candy razor blades they would have there in the P.X."

The record is replete with testimony of the unlawful sale of beer and whiskey at this school.

It might be well to state here the fact that many well meaning people had made contributions to this school accounts at least in part for its continued operation, but the record fails to show that the school had any plan, or standard for teaching and studies and it seems that it was operated more as a vocation work shop than as an ordinary school. The work was carried out according to the day by day, or week by week ideas of Mr. Horton.

We have considered all the assignments of error, find them without merit and they are accordingly overruled. The case will be remanded to the Circuit Court of Grundy County for the appointment of a Receiver.

It might be observed here that we base our decision on the two propositions before the Court, that is the operation of this School for the personal benefit of Myles Horton, and that in such operation he repeatedly violated the criminal laws of this State in the sale of whiskey and beer in and about this school, and that this being so, it is unnecessary for us to pass upon the constitutional question as to the mixing of white and colored, male and female, in the same school.

PREWITT, C.J.

Justices Tomlinson, Burnett Swepston and Felts concur.

(From the Supreme Court Minutes, Book 45, Page 62)

STATE OF TENNESSEE EX REL A. F. SLOAN,
District Attorney General

v.

HIGHLANDER FOLK SCHOOL

GRUNDY LAW

AFFIRMED

This cause coming on to be heard upon a transcript of the record from the Circuit Court of Grundy County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is no error.

It is therefore ordered and adjudged by the Court that the judgment of the Court below be in all things affirmed and that the cause be remanded to the Circuit Court of Grundy County for the appointment of a Receiver and such further proceedings as may be necessary in the execution and enforcement of the judgment of that Court; and for the collection of the cost of the Court below; for all of which let procedendo issue.

The cost of the appeal will be paid by the Highlander Folk School, principal; and the Summit Fidelity & Surety Company, surety; for which let execution issue. 4/5/61

(Filed May 5, 1961)

Opinion and Judgment of the Supreme Court of Tennessee on Petitions for Rehearing

STATE OF TENNESSEE EX REL A. F. SLOAN,
District Attorney General

v.

HIGHLANDER FOLK SCHOOL

GRUNDY LAW

Hon. Chester C. Chattin, Judge

ATTORNEYS FOR APPELLANTS	ATTORNEYS FOR APPELLEE
GENERAL A. F. SLOAN	CECIL D. BRANSTETTER
A. A. KELLY	GEORGE E. BARRETT
South Pittsburg, Tennessee	Nashville, Tennessee

ON PETITION TO REHEAR

The State through the District Attorney General as relator below has filed a petition to rehear, complaining that this Court failed to order the properties of the defendant below escheated to the State.

This Court ordered this cause be remanded to the Circuit Court of Grundy County for the appointment of a receiver for the liquidation of the defendant, corporation, consistent with the opinion.

Highlander Folk School, etc., has also filed its petition to rehear, but upon examination of this petition it appears that the case is just being reargued as to the facts and the law heretofore set out in our opinion under date of April 5, 1961. We discussed the material facts in our opinion and the petition presents no new facts, or arguments to change our view in our said opinion.

It results that both petitions to rehear are denied.

PREWITT
Prewitt, C. J.

(From the Supreme Court Minutes, Book 45, Page 72)

STATE EX REL, SLOAN DISTRICT ATTORNEY GENERAL

v.

HIGHLANDER FOLK SCHOOL

Grundy Law

Petitions to Rehear Denied

This cause coming on further to be heard on two petitions to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petitions they are denied at the cost of Highlander Folk School principal; Summit Fidelity and Surety Company, surety; for which let execution issue. 5 5 61.

Opinion of the Circuit Court of Grundy County

No. 90

STATE OF TENNESSEE EX REL A. F. SLOAN,
District Attorney General

v.

HIGHLANDER FOLK SCHOOL

This suit was instituted by the State through its District Attorney General seeking ultimately to have the charter of defendant revoked and the Corporation dissolved.

The petition charges that the defendant was engaging and maintaining a place where certain transactions were permitted to be carried on constituting a nuisance under the State's nuisance act. The petition also charged that defendant was in violation of the State's quo warranto statutes. The petition prayed that the nuisance be abated and that the Charter of the corporation be revoked.

The defendant, Highlander Folk School, filed a demurrer coupled with an answer.

The grounds of the demurrer were: (1) the suit was multifarious; (2) there was a misjoinder of causes of action; (3) the suit was unknown to the forms of Chancery; and (4) proper and necessary parties are not before the Court.

The answer stated in substance that the school had been operated in a conformity with its charter; that it was not being operated as a public nuisance; that the charges in the petition were not sufficient to authorize a revocation of its charter.

There have been two hearings on this matter, one in September, 1959, relative to the nuisance aspect of the petition.

At the beginning of that hearing it was agreed by the attorneys for both parties that the demurrer be pretermitted until the final hearing.

The Court found that the defendant had been engaging in the sale of beer in its main or administrative building and ordered this building padlocked.

At the insistence of defendant the Court set the final hearing of this matter for November 3, 1959, the same being the second day of the regular term in November of the Circuit Court for Grundy County.

On that date the relator moved to amend his petition by striking from the petition all prayers for injunctive relief; which amounted to nothing more than electing to proceed under the quo warranto statute seeking a revocation of the charter. The Court granted the motion to amend and overruled defendant's demurrer.

Defendant insists that the Court erred in allowing the amendment for the reason it in effect permitted relator to voluntarily dismiss the nuisance aspect of the petition. This position is not sound for the reason the nuisance aspect had been heard in September and the defendant insisted that the findings of the Court at that time were conclusive and agreed as well as insisted that the evidence adduced upon that hearing be filed and treated as evidence upon the final hearing. The dismissal of the nuisance aspect was, of course, in favor of defendant and not to its detriment. Furthermore, the Court is of the opinion that T. C. A. 23-307 applies before any hearing has been had on a nuisance petition.

Defendant insists the Court erred in overruling its demurrer especially on the grounds of misjoinder of actions and multifariousness.

Title 21. Section 607 provides: "The uniting in one bill of several matters of equity, distinct and unconnected, against one defendant, is not multifarious".

Both the nuisance and quo warranto statutes provide that both proceedings shall be tried according to the forms of Chancery.

The amendment allowing relator to strike from his bill all prayers for injunctive relief and electing to proceed on the quo warranto aspect of the case alone cured any objection as to misjoinder of actions.

Further defendant school insists the Court was in error in submitting the issue of whether or not the school was being operated for the personal gain of its President, Myles Horton. Defendant insists that this issue involved a complicated accounting and that it was a mixed question of law and fact.

The Court must respectfully disagree with defendant. It is true that there was proof as to the value of the real estate conveyed to Horton by defendant in 1957. But whether the value of it was $35,000.00 as contended by relator or $12,000.00 as contended by defendant is immaterial since whatever its real value may have been enriched Horton to that extent.

It is likewise true that relator introduced an accountant as to the financial condition of the school. The accountant testified the school was in good financial condition. There were no accounts to be settled between relator and defendant. Nor were there any accounts to be settled between defendant school and its President, Myles Horton. He did not claim a back salary. The executive counsel voted to give him the real estate on the pretext he was due a back salary.

There is no proof in this record that defendant school was ever, throughout its existence, insolvent or unable to pay its officers a reasonable salary.

Title 23-2815 Tennessee Code Annotated provides: "Such issues of fact as may become necessary to try by jury in the progress of the cause, shall be made up under the direction of the Court, and submitted to a jury impaneled forthwith".

The final hearing of this cause was before a jury of eleven men and one lady of Grundy County.

One issue of fact was submitted to the jury, to-wit: "Has Highlander Folk School been operated for the personal gain of Myles Horton?"

(The question of the sale of beer was a settled issue, or, in other words, the defendant's attorney stated in open

Court that the findings of the Court in the September hearing were conclusive.)

(The question of integration at defendant's school was admitted by defendant but insisted that the segregation laws of this state had been held unconstitutional by the Supreme Court of the United States.)

The jury answered the question submitted to them by the Court in the affirmative.

The questions to be decided by the Court are: Does the fact that defendant school having permitted Myles Horton to operate same for his own personal gain work a forfeiture of defendant's charter?

Does the sale of beer and other commodities without a license by the defendant authorize a forfeiture and revocation of its charter?

Does the practice of integration at defendant's institution authorize a forfeiture and revocation of its charter?

As to the first question, this Court is satisfied with the verdict of the jury. The preponderance of the proof is to the effect that Myles Horton was conveyed some seventy acres of land with valuable improvements upon it by the defendant, Highlander Folk School. That he handled all the money of the school. That although Miss May Justus was the Secretary and Treasurer of the school she did not write checks or handle the money or any of the finances of the school. The President, Myles Horton, handled the finances of the defendant. He wrote all the checks or designated someone when he was away to write the checks. He used the defendant's money to pay his household servants. He reared a family on defendant's property and all the expenses of taking care of himself and family throughout some 25 years were paid out of defendant's funds. He paid for the building of an outbuilding on the property conveyed to him by defendant out of defendant's funds. Horton testified that during the first years of the school he put everything into the building of the school with the idea of getting it out of the school at some later date.

Horton testified that for the past few years he has been drawing a salary of some $9,000.00 annually. However, he was unable to produce any record of the directors or executive counsel having fixed his salary. The inference is that he fixes his own salary.

There isn't any proof that the governing officers of defendant school have ever protested any of the Acts of Horton in the illegal operation of the school.

The Charter of defendant provides: "The general welfare of society, not individual profit, is the object for which this charter is granted, and the members are not stockholder; in the legal sense of the term; and no dividends or profits shall be divided among them".

Tennessee Code Annotated 48-1106 provides: "Any corporation chartered under the laws of Tennessee for religious, charitable, educational, missionary, or other eleemosynary purposes, and not for profit shall have the power to receive property, real, personal or mixed, by purchase, gift, devise, or bequest, sell the same and apply the proceeds toward the promotion of the objects for which it is created, or hold any such property and apply the income and profits toward such objects."

This statute does not authorize a corporation to convey its property to one of its officers on the pretext that it is conveying it to him for a back salary. Defendant had no right to let Horton live upon this property for 25 years without paying taxes, then give it to him.

The Charter of defendant further provides: "A violation of any of the provisions of this Charter shall subject the corporation to dissolution at the insistence of the State."

The Court finds no case in Tennessee dealing with such a provision in a Charter. However, in the case of State ex rel v. Family Loan Co., 167 Tenn. 654, it is held that "Corporations accept their franchises upon the implied condition that they will legally use them". And further, "The defendant can only be ousted of its franchise for misuse or abuse of powers which involve its right of

existence, for acts that produce or tend to produce injury to the public, for acts perversive of the objects for which it was created and which injuriously affect the public welfare—a purpose which corporations are supposed to promote."

"If a corporation violates some general statute or rule of the common law which applies alike to individuals and to corporations, the state may forfeit its charter and adjudge its dissolution equally as well as in the case where *it fails to obey the express or implied conditions of its Charter* or the provisions of some statute directed against it imposed for the benefit of the public." 13 Am. Jur. Section 1318, page 1176.

"The breach or nonperformance of requirements expressly imposed upon a corporation may constitute a ground for forfeiture of its Charter. This is clearly the result where the act or omission is expressly made a ground for forfeiture; and even if not, it is sufficient that the requirements were expressly imposed for the benefit of the public". 13 Am. Jr. Section 1314, page 1175.

The operation of this school for the personal gain of Horton was a misuse and abuse of its powers and perversive of the objects for which it was created and injurious to the public. It is needless to say that under the scheme of operation as used by Horton he evaded the payment of taxes.

The sale of beer by defendant on its premises without a permit and license was a willful and intentional act and in direct violation of the express provision of its charter in that it could not engage in any trading operations. It was a violation of the criminal laws of the state as well as the nuisance statutes.

Title 49, Section 3701 of the Tennessee Code Annotated provides:

"It shall be unlawful for any school, academy, college or other place of learning to allow whites and colored persons to attend the same school, academy, college or other place of learning."

Defendant admits that it practices integration and that it is a private institution. That it is an adult educational institution was proven by a preponderance of the evidence at the trial.

The defendant insists that the Supreme Court of the United States in the case of Brown v. The Board of Education, 347 U.S. 483 held that the foregoing statute was held unconstitutional. Defendant further insists that the Fourteenth Amendment to the Constitution of the United States forbids state action based on race.

The Supreme Court held as follows in the Brown case: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place".

The relator insists that this holding does not render the statute unconstitutional as to private schools.

"Statutes may be unconstitutional and void as to their application to a part of their subject matter and valid as to other parts, or, to state the problem more concretely, they may be constitutional in operation with respect to some persons and states of fact and unconstitutional as to others". 11 Am. Jur. Section 163, page 857.

"A law may be unconstitutional as far as it affects natural persons, and yet as to corporations it may be valid". 11 Am. Jur. Section 163, page 858.

In the case of Roy Goward College Trusteeship 391 PA. 434, it was held that a school created by will of a testator and to be operated for white males only are entitled to the protection of the law, and to enforce the same is not discriminatory state action.

"It is equally well settled that the liberty guaranteed under this amendment against deprivation without due process of law is a liberty of natural, and not artificial persons". 11 Am. Jur. Section 329, page 1134.

"Corporation is an artificial being, invisible, intangible and existing only in contemplation of law." 21 Tenn. App. 463.

This Court is of the opinion that the segregation laws of the State as applied to private schools are constitutional and valid.

The Court is of the further opinion that in view of the findings of the jury to the effect that Myles Horton, the President of the defendant corporation, has been operating the school for his own personal gain is such a misuse of defendant's charter as works a forfeiture of same.

The Court is of the further opinion that the defendant having violated the criminal laws of the state in that it has permitted the sale of beer to be carried on upon its property without a permit or license and permitting integration in its school works a forfeiture of its charter, the defendant having accepted its Charter with the condition that "a violation of any of the provisions of this charter shall subject the corporation into dissolution at the insistence of the State".

The Court further finds that the deed to Horton from defendant is void for the reason the charter provides that no profits may be divided among its members.

Relator insists that upon revocation of defendant's charter that the property escheats to the State. However, the Court is of the opinion Title 23, Section 2818, Tennessee Code Annotated, applies. Therefore, a receiver will be appointed by the Court to wind up defendant's affairs.

Defendant may have 30 days from entry of order to file a motion for a new trial.

CHESTER C. CHATTIN
Judge

APPENDIX B

Committees Report on Integration

The following report was approved unanimously by the Board of Trustees:

To the President and Board of Trustees at Bethel College at McKenzie, Tennessee.

REPORT

Your committee would most respectfully report to the Board of Trustees as follows:

I

We, the members of the special committee appointed by you in response to the direction issued by the last General Assembly to make a study of the challenge to offer courses of instruction to the Cumberland Presbyterian Church of the United States and Liberia report that we have met and preferably and carefully considered our assignment. We find that the full Board of Trustees are fully aware and sympathetic toward the educational needs of the above mentioned church. We have studied this problem at length, discussed at length the advisability of integration in West Tennessee, and further the feasibility of integration in a western Tennessee town that cannot and will not house, feed or does not have the church or other facilities for Negro students. During the discussion, the question of legality of integration of the school was introduced. This question had never been decided under Tennesee Law.

The college is operating under a general welfare charter from the State of Tennessee as a non-profit corporation. The question of legality of integration in private schools was pending at the time of this meeting before the Honorable Chester C. Chattin, Circuit Judge of the Eighteenth Judicial Circuit in the County of Grundy, State of Tennessee in the cause of: *State of Tennessee ex rel A. F. Sloan, District Attorney General* vs. *Highlander Folk School No. 90.*

In view of this pending decision at the time of this meeting your committee was of the opinion that some question insofar as the legality of integration could possibly be raised by Public Officials including the Attorney General of Carrol County, in which Bethel College is situated. In view of this question your committee felt that integration at this time should not be attempted.

II

The Honorable Chester C. Chattin, Circuit Judge, ruled on this matter on February 16, 1960. In that ruling he interpreted TCA Section 49-3701 which provides as follows: "It shall be unlawful for any school, academy, college, or other place of learning to allow whites and colored persons to attend the same school, academy, college or other place of learning."

Judge Chattin held in the decision that the defendant, Highlander Folk School, was in violation of this Tennessee Code section and further that this was sufficient violation to revoke the charter of Highlander Folk School. Judge Chattin further held in his opinion that the famous case of *Brown* vs. *The Board of Education* No. 47 U.S. 483 struck down only prohibition toward integration of tax supported schools and did not affect private schools. The opinion of Judge Chattin is attached to this report as Exhibit Number One.

III

In view of the lack of facilities for Negro students in the City of McKenzie, and further in view of the opposition to any form of integration in Western Tennessee, wherein said college is situated, and in view of the support that the school has received from the City of McKenzie, Carrol County and other sources, and in view of the fact that a major portion of the enrollment of said school comes from the area around Carrol County in West Tennessee, the committee recommends that no integration be attempted at this time.

Your committee is further of the opinion that if an attempt to integrate was made by the school administration, that some legal action could and possibly would be taken by the Attorney General's Office who has the jurisdiction for the county in which Bethel is situated, and that since the decision of Judge Chattin, holding the State Law valid, which is in full force and effect until reversed by a high court, the Board of Trustees would be violating Tennessee Law, specifically TCA Section 49-3701 if they attempted to integrate the school, and subject the school to the possibility of having its charter revoked. In view of paragraph eighty-eight of the Confession of Faith, we have no choice but to comply with the law.

We recommend that the Board of Trustees request of the General Assembly that it be permitted to contact and communicate with the Cumberland Presbyterian Church of the United States and Liberia and determine what educational assistance is needed and report back a form of lawful action to be taken to assist in the afore-said church's educational program.

We further recommend that a full copy of the report and exhibit be included in our report to the next General Assembly, showing the study and recommendations of this committee, and that this report be adopted as the report of the Board of Trustees to the General Assembly.

(The General Assembly voted that the "Exhibit" referred to above not be printed as a part of the Permanent Minutes.)—S.C.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 279.

HIGHLANDER FOLK SCHOOL,
Petitioner,

vs.

STATE OF TENNESSEE Ex Rel. A. F. SLOAN, District Attorney General, Eighteenth Judicial Circuit,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 279.

HIGHLANDER FOLK SCHOOL,
Petitioner,

vs.

STATE OF TENNESSEE Ex Rel. A. F. SLOAN, District Attorney General, Eighteenth Judicial Circuit,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The respondent, State of Tennessee, for its statement in opposition to the petition for certiorari, respectfully shows the following:

OPINION BELOW.

This suit was commenced in the Circuit Court of Grundy County, Tennessee, to forfeit the charter of Highlander Folk School because of its activities in violation of its

charter and the criminal laws of the State of Tennessee. The Supreme Court of Tennessee, following precedents of long standing, affirmed the judgment of the trial court forfeiting the charter on the ground that the corporation had violated the criminal laws of Tennessee in selling intoxicating beverages without a license, and on the ground that the corporation, contrary to the provisions of its charter and in violation of the statutes under which it was organized, was being operated for the private gain of its president.

The Supreme Court of Tennessee, following its own precedents and the universally accepted rule, unanimously held that it was unnecessary for a determination of the issues to adjudicate the question of the constitutionality of the Tennessee statute prohibiting integration in *private* schools.

The opinion of the Supreme Court of Tennessee is reported at 345 S. W. 2d 667.

JURISDICTION.

The respondent, State of Tennessee, urges that this Court is without jurisdiction for the reason that the decision of the Supreme Court of Tennessee is based on adequate nonfederal grounds and is supported by sound precedents of long standing.

QUESTIONS PRESENTED.

1. Where the criminal laws of a state prohibit the sale of intoxicating beverages without a license and specifically declare such offense to be a public nuisance, and the highest court of the state finds that the record is replete with testimony of the unlawful sale of beer and whiskey by a general welfare corporation engaged in educational activities, and further finds that such sale constitutes a public

nuisance, is the forfeiture of the charter of such corporation based on adequate nonfederal grounds?

2. Where a general welfare corporation is organized under a state law which prohibits the operation of such corporation for private and individual profit, and where the corporation's charter likewise contains such prohibition and further provides that any violations of the charter shall subject the corporation to dissolution at the instance of the state, and the highest court of the state finds that the president of such corporation has joined in a deed conveying to himself valuable real property belonging to such corporation, and that for a quarter of a century the expenses of taking care of the president, his family, and his household servants have been paid from the corporation's funds, is the forfeiture of the charter of such corporation based on adequate nonfederal grounds?

3. Where the highest court of a state has long held that only bona fide *social clubs* are exempt from the statutory prohibition against the sale of intoxicating beverages without a license, and then only if such sales are made solely to, or for the benefit of, its own members, and where the court has repeatedly warned that no other type of organization is exempt, is the refusal of the court to afford the exemption to a corporation organized *for educational purposes*, which sells such beverages to teachers and students, including minors, a departure from state law and the court's own precedents?

4. Where the statutes of a state, as construed by the state's highest court, provide that when a state court finds that a corporation is engaging in unlawful activities, the court may either (1) enjoin such activities or (2) forfeit the charter, depending on the facts of each case, and the precedents of the court show that in the past the charter of a corporation has been revoked because of the violation of a state law which constituted a public nuisance, is a

decision of the court forfeiting the charter of a private, racially integrated educational institution because of the violation of a state law prohibiting the sale of intoxicating beverages without a license, which violation constitutes a public nuisance, a departure from state precedent and does it deny to petitioner due process of law and equal protection of the laws under the Fourteenth Amendment?

STATEMENT OF THE CASE.

On October 20, 1934, the State of Tennessee granted a general welfare charter to Highlander Folk School for the following purposes:

> "The particular purposes for which this charter is sought are the support of Highlander Folk School, adult workers education, the training of rural industrial leaders, and general academic education."

Sections 48-1109 and 48-1110, Tennessee Code Annotated, which authorize the creation of such corporations specifically prohibit any type of trading operation or individual profit. Appendix A. The provisions of the charter likewise forbid trading operations or individual profit. Appendix B.

The charter also provides as follows:

> "A violation of any of the provisions shall subject the corporation to dissolution at the instance of the State."

On August 12, 1959 the District Attorney General filed a complaint against Highlander Folk School in the Circuit Court of Grundy County.

The original complaint contained no averment whatever relating to the mixing of the races or the operation of the school as an integrated institution.

The bill was dual in nature in that it sought two different types of relief under two different chapters of the Tennessee Code. First, it sought to enjoin the further operation of the school as a public nuisance, under the provisions of Sections 23-301 to 23-312 of the Code, Appendix C, because of the sale of intoxicating beverages without a license. Second, it sought a forfeiture of the school's charter, under the quo warranto statutes, Sections 23-2801 to 23-2821 of the Code, Appendix D, because the corporation was being operated for the financial benefit of Myles Horton, its president.

As to the first ground, the bill alleged that Horton, the president, and his subordinates were storing and selling intoxicating beverages on the premises, that persons from many states gathered together at the school for the purpose of consuming beer, whiskey, rum, and other intoxicants, in violation of the laws of the State of Tennessee, and that the maintenance and operation of the property constituted a public nuisance and should be abated. The complaint, as to the second ground, averred that Horton, as an officer of the corporation, had joined in a deed attempting to convey to himself valuable real property belonging to the corporation.

The bill prayed for three types of relief. As to the first ground, the public nuisance, the State asked (1) for a temporary injunction restraining the continuance of the nuisance and (2) that at the hearing the premises be declared a nuisance and abated and that a perpetual injunction be granted. As to the second ground, the operation of the corporation for the private gain of its president, the State asked (3) that the charter be forfeited.

There were two hearings, one of which was before a jury and the other before the Circuit Judge sitting without a jury.

The first hearing was held on the application for the temporary injunction, on September 14, 15 and 16, 1959, approximately one month after the complaint was filed. No jury was involved. The trial was before the Circuit Judge sitting without a jury. The trial judge found that the corporation had been conducting, "maintaining or engaging" in the sale of beer and that a temporary injunction should issue. The injunction was based on the provisions of Section 23-301, Tennessee Code Annotated, which declares that the unlawful sale of intoxicating liquors shall be a public nuisance. Appendix F.

Up to this point in the proceedings, the State had made no allegations in the pleadings relative to the integration issue.

On October 27, 1959, more than a month after the Circuit Judge had issued a temporary injunction restraining the unlawful sale of intoxicating beverages at the school, as a public nuisance, the District Attorney General amended the original bill so as to make more specific the initial averments and, in that amendment, for the first time, averred that the school, a private school, had violated the provisions of Section 49-3701, Tennessee Code Annotated, by operating on an integrated basis.

The case was tried on the merits in the Circuit Court on November 3, 4, 5, and 6, 1959.

In responding to the complaint filed against it, Highlander Folk School had filed a demurrer coupled with an answer. In its demurrer, the school had urged that under the rules of Tennessee procedure the State could not seek to abate a nuisance, with the resulting injunctive relief, and forfeit a corporate charter in the same suit. Appendix E.

Therefore, since Highlander Folk School had raised the procedural question, the State, when the hearing opened

in November, amended its bill so as to delete any and all prayers for injunctive relief, of any type whatever. Appendix G.

Thus, the case stood for trial in the Circuit Court, as it was to be heard before the State Supreme Court later, on the ultimate question of whether the school's charter should be forfeited.

The issue as to the sale of beer in violation of the state statute had been determined at the September hearing. The issue as to integration was admitted. Therefore, the sole issue submitted to the jury was whether the school had been operated for the personal profit of Myles Horton, its president. This issue was submitted to the jury under the provisions of Section 23-2815, Tennessee Code Annotated, Appendix D. The jury answered the question in the affirmative.

On the state of the pleadings, the only alternatives open to the trial judge were either to dismiss the action or to order the charter forfeited. All prayers for injunctive relief had been eliminated. The trial judge, therefore, entered an order forfeiting the charter.

On appeal the Supreme Court of Tennessee found as a fact that the record was replete with testimony of the unlawful sale of beer and whiskey at the school. Large quantities of beer were possessed and promiscuously sold to the students, many of whom were minors, as well as to the teachers. All of such sales were made without a license and in violation of the criminal laws of Tennessee.

Large stacks of beer cans and whiskey jugs and bottles were found at the school. Many of the exhibits in the record showed that revolting and inexcusable conduct was engaged in at the institution.

The State Supreme Court held that the mentioned activities constituted a public nuisance under the provisions of Section 23-301, Tennessee Code Annotated.

The Supreme Court of Tennessee further found as a fact that Highlander Folk School had unlawfully conveyed to Myles Horton, its president, some seventy acres of land with valuable improvements thereon. Horton had reared a family on the school's property, and all of the expenses of himself, his family, and his household servants were paid out of the school's funds for a period of twenty-five years.

Although the school had a treasurer, the treasurer did not write the checks or handle the money or any of the finances of the school. Horton himself wrote all the checks, or designated someone to do so in his absence, and handled all the fiscal affairs of the institution.

There was no evidence that the governing officers of the school ever at any time protested any of Horton's illegal acts in the operation of the institution.

The State Supreme Court held that the school had been operated for the personal gain of Myles Horton contrary to the provisions of its charter, and that such unlawful operation was perversive of the objects for which the institution was created and was injurious to the public.

The Supreme Court of Tennessee, therefore, held that the charter should be forfeited on the grounds (1) that intoxicating beverages had been sold at the school without a license and in violation of the criminal laws of the state, which constituted a public nuisance, and (2) that the school had been operated for the private gain of Myles Horton, the president, contrary to the laws of Tennessee.

I.

The Opinion of the State Court Rests Upon Adequate and Independent Nonfederal Grounds.

The Supreme Court of Tennessee based its action on the grounds (1) that intoxicating beverages had been sold at the school without a license in violation of the criminal laws of the state, which constituted a public nuisance, and (2) that the school had been operated for the private gain of Myles Horton, the president, contrary to the laws of Tennessee.

The issues of fact were for the conclusive determination by the state court and are not open for reconsideration by this Court. *Watts v. State of Indiana*, 338 U. S. 49; *Watts v. State of North Carolina*, 364 U. S. 177.

A. The Sale of Intoxicating Beverages Without a License Is a Violation of the Criminal Laws and Constitutes a Public Nuisance.

The Supreme Court of Tennessee made the following findings of fact:

> "It is also in evidence that large stacks of beer cans, whiskey jugs and bottles were found about the school." 345 S. W. 2d 668.
>
> "At many of their entertainments beer was sold without a license, and in many cases to minors." 345 S. W. 2d 668.
>
> "The record is replete with testimony of the unlawful sale of beer and whiskey at this school." 345 S. W. 2d 670.

The prohibition against the sale of beer without a permit is clear. Section 57-204, Tennessee Code Annotated, provides as follows:

"Permit from county and/or city required.—It shall be unlawful for any person to sell, distribute and manufacture the beverages prescribed herein without first having made application to and obtained a permit from the county and/or city where such business is to be conducted under the authority herein delegated to said counties and cities."

The law forbidding the sale of beer to minors is particularly stringent. Section 57-221, Tennessee Code Annotated, provides as follows:

"No person engaging in the business regulated hereunder shall make or permit to be made any sales to minors. . . ."

"It shall be unlawful for the management of any place where any beverage licensed hereunder is sold to allow any minor to loiter about such place of business, and the burden of ascertaining the age of minor customers shall be upon the owner or operator of such place of business."

Under the provisions of Section 23-301, Tennessee Code Annotated, the unlawful sale of intoxicating beverages is declared to be a public nuisance. Appendix C.

The Supreme Court of Tennessee has held that engaging in the unlawful sale of intoxicating beverages is of that class of nuisances to be treated by the Court as tending to disturb the peace and good order of the community. *State v. Reichman*, 135 Tenn. 685, 710 to 713.

The appellate courts of Tennessee have repeatedly affirmed the judgments of trial courts enjoining such public nuisances. *Poston v. State*, 36 Tenn. App. 413; *Johnson v. Smith*, 36 Tenn. App. 441. Permitting minors to congregate where beer is sold is held to constitute a public nuisance. *State ex rel. Henderson v. Cuniff*, 30 Tenn. App. 347.

The petitioner's contention that it was exempt from the provisions of the law is without basis. The assertion that the rule applicable to *social clubs* should have been applied to it is without foundation in either law or fact.

The Supreme Court of Tennessee has held that the only instance in which intoxicating beverages may be sold without a license is by a bona fide social club. *Tennessee Club of Memphis v. Dwyer*, 79 Tenn. 452; *Moriarty v. State*, 122 Tenn. 440; *State ex rel. v. Mountain City Club*, 136 Tenn. 102.

The State Supreme Court has repeatedly warned that the club must be a valid social club. *Moriarty v. State*, 122 Tenn. 440, 453 to 454; *State ex rel. v. Mountain City Club*, 136 Tenn. 102, 116 to 117. And it has held that even if the club is a bona fide social club, the exemption will not be applicable if other specified conditions are not met. *Hermitage Club v. Shelton*, 104 Tenn. 101.

The purposes for which the petitioner was incorporated are:

> ". . . the support of the Highlander Folk School, adult workers education, the training of industrial leaders, and general academic education."

Does the petitioner contend that it is a social club or that it is an educational institution? If it claims that it is a social club, then it admits that it has abused the privileges granted by its charter. If it concedes that it is an educational institution, then it is not entitled to claim the exemption afforded to social clubs.

Under the laws of Tennessee the sale of intoxicating beverages by the petitioner clearly constituted a public nuisance.

B. **The Operation of the School for the Private Gain of Its President Was in Violation of Its Charter and Contrary to the Laws of Tennessee.**

On the issue of the school being operated for the private gain of its president, the Supreme Court of Tennessee made the following findings of fact:

> "As to the first question this court is satisfied with the verdict of the jury. The preponderance of the proof is to the effect that Myles Horton was conveyed some 70 acres of land with valuable improvements upon it by the defendant, Highlander Folk School. That he handled all the money in the school, that although Miss May Justus was the secretary and treasurer of the school, she did not write checks, or handle the money, or any of the finances of the school. The President, Myles Horton handled the finances of the defendant. He wrote all the checks or designated some one when he was away to write the checks. He reared a family on defendant's property and all the expenses of taking care of himself and family and household servants, through some 25 years were paid out of defendant's funds."
>
> . . . . . .
>
> "There isn't any proof that the governing officers of defendant, school, have ever protested any of the acts of Horton in this illegal operation of the school." 345 S. W. 2d 669.

Section 48-1109, Tennessee Code Annotated, one of the sections under which the charter was issued, provides as follows:

> "The means, assets, income, or other property of the corporation shall not be employed, directly or indirectly, for any other purpose whatever than to

> accomplish the legitimate objects of its creation, and by no implication shall it engage in any kind of trading operation, nor hold any more real estate than is necessary for its legitimate purposes."

The charter issued to the petitioner provides as follows:

> "The general welfare of society, not individual profit, is the object for which the charter is granted, and the members are not stockholders in the legal sense of the term and no dividends or, profits, shall be divided among them. . . ."

Section 23-2802, Tennessee Code Annotated, one of the sections under which the charter was revoked, provides in part as follows:

> "The action also lies to bring directors . . . and officers of a corporation . . . to an account for the management and disposition of property intrusted to their care: . . . to prevent malversation, peculation, and waste. . . ." Appendix D.

As president of the corporation, Myles Horton could not lawfully convey corporate property to himself or use the corporation for personal gain.

In joining with the treasurer of the corporation in conveying a valuable parcel of real estate to himself, Horton violated a basic principle applicable to fiduciaries and his act was in clear violation of the holdings of the courts of Tennessee. *Tisdale v. Tisdale*, 34 Tenn. 596, 608; *Gillespie v. Branham*, 337 S. W. 2d 689.

Horton, in using the petitioners' property and assets for taking care of himself, his family, and his household servants for a quarter of a century, used the corporation for private gain contrary to the statutes and in plain violation of the corporation's charter.

The State Supreme Court was correct in finding that the operation of the school for the personal gain of its president "was a misuse and abuse of its powers, and perversive of the objects for which it was created and injurious to the public."

Thus, it is clear (1) that the corporation's acts in selling intoxicating beverages were not only unlawful but constituted a public nuisance and (2) that the operation of the institution for the personal gain of its president was in violation of its charter and contrary to the statutes of Tennessee.

II.

The State Court Did Not Depart From Applicable Rules of Tennessee Law.

In asserting that the State Supreme Court departed from applicable rules of Tennessee law and its own precedents, the petitioner relies upon two points. First, that the sale of intoxicating beverages at the school without a license was lawful under prior decisions of the Court. Second, that the unlawful activities should have been enjoined and that the charter should not have been forfeited.

Neither of these contentions is sound.

The petitioner, an educational institution, was not entitled to sell intoxicating beverages without a license under the decisions of the Supreme Court of Tennessee.

For more than seventy-five years the Court has consistently held that only social and fraternal clubs may lawfully sell intoxicating beverages without a license. The only cases in Tennessee on the subject involve social and fraternal organizations. *Tennessee Club of Memphis v. Dwyer*, 79 Tenn. 452; *Hermitage Club v. Shelton*, 104 Tenn.

101; *Moriarty v. State*, 122 Tenn. 440; *State ex rel. v. Mountain City Club*, 136 Tenn. 102.

The Court has repeatedly warned that the club must be a bona fide social club, and that the Court would "scrutinize closely" in order to determine whether the organization was in fact a valid social club. *Moriarty v. State*, 122 Tenn. 440, 453 to 454; *State ex rel. v. Mountain City Club*, 136 Tenn. 102, 116 to 117.

In determining whether the particular club met the requirements, the Court has looked to see (1) whether it was organized for social and benevolent purposes; (2) whether an initiation fee was required and whether regular dues were paid; (3) whether the intoxicating beverages were kept and sold to members only; and (4) whether a profit was made on the sales and, if so, in what manner the profit was used by the club.

The Court has applied the tests in such a strict manner that in *Hermitage Club v. Shelton*, 104 Tenn. 101, the Court refused to allow the exemption even to a bona fide social club, which made sales only to its members, simply because the profits from sales went into the corporation's general fund and were used for the general operating expenses of the club.

In the present case the petitioner does not claim to be a social club, bona fide or otherwise. Indeed, it could not possibly support such a claim. The corporation was organized for:

> ". . . the support of the Highlander Folk School, adult workers education, the training of industrial leaders, and general academic education."

The contention that the Supreme Court of Tennessee departed from its own precedents in declining to afford

the exemption to the petitioner, an educational institution, is without any legal basis whatever.

It is also clear that the State Supreme Court did not depart from applicable rules of state law in forfeiting the petitioner's charter.

Contrary to the petitioner's assertion, this is not the first case in the history of Tennessee in which the charter of a corporation has been revoked. In *State ex rel. v. National Optical Stores Co.*, 189 Tenn. 433, the charter was revoked. The reason for the revocation was the violation of a state law. The violation of the state law in that case constituted a public nuisance because it involved the unlawful practice of a profession, although the State Supreme Court did not specifically so hold. Section 23-313, Tennessee Code Annotated, Appendix C.

In the present case, the Supreme Court of Tennessee followed the well established rules of state law.

Under the provisions of Sections 23-2813 and 23-2817, Tennessee Code Annotated, the wrongful acts may be enjoined or the charter may be forfeited. Appendix D. The relief granted is determined by the facts of each case.

The rule followed in Tennessee is set out in *State ex rel. v. Junior College*, 166 Tenn. 535, as follows:

> "From the foregoing it seems plain that the court can, in a suit like this, exclude a corporation from pursuing a certain endeavor, or the court can exclude such corporation altogether from pursuing any endeavor and decree a dissolution. *The relief granted is to be determined by the facts of the case*" (Emphasis supplied) 166 Tenn. 541, 542.

Prior decisions show without doubt that the Court has consistently followed the above rule. For instance, in both

State ex rel. v. Credit Men's Assn., 163 Tenn. 450, and *State ex rel. v. National Optical Stores Co.*, 189 Tenn. 433, the State prayed (1) for an injunction and (2) a forfeiture. In the first case only an injunction was granted; in the second case the charter was revoked. In the first case the Court found that "there was room for an honest difference of opinion as to the legality" of the corporation's methods, and granted an injunction only, refusing to forfeit the charter. In the second case, the Court found the facts were such that the charter should be revoked. Although the Court did not so state, the offense constituted a public nuisance under the provisions of Section 23-313, Tennessee Code Annotated, Appendix C.

The petitioner's insistence that the Court should have enjoined its unlawful activities instead of forfeiting its charter is without merit. At the time the case reached the State Supreme Court on appeal, all prayers for injunctions of any type had been deleted from the pleadings. The deletion of such prayers was brought about by the petitioner's insistence in its demurrer that the State could not maintain in the same suit (1) an action seeking an injunction to abate a public nuisance under the provisions of Sections 23-301 to 23-312, Tennessee Code Annotated, and (2) a quo warranto action under the provisions of Sections 23-2801 to 23-2821, Tennessee Code Annotated. Appendix E. The State had amended its complaint by eliminating all prayers for injunctive relief in order to meet the objections raised by the petitioner's demurrer. Appendix G. Thus, the State Supreme Court had before it a complaint seeking only a forfeiture.

In *State ex rel. v. Junior College*, 166 Tenn. 535, and *State ex rel. v. Southern Pub. Assn.*, 169 Tenn. 257, the only relief prayed was an injunction. In neither of those cases could the State Supreme Court have decreed a dis-

solution, because to do so would have resulted in granting relief outside the pleadings.

In none of the cases cited by the petitioner could the Tennessee courts have found on the facts that the corporation's violation of the Tennessee law constituted a public nuisance as in the instant case.

In the present case not only was there a public nuisance but the Court found that the corporation was being operated for the private gain of its president, contrary to the charter, and that the charter specifically provided that:

> "Any violation of the provisions shall subject the corporation *to dissolution* at the instance of the state" (Emphasis supplied).

If the forfeiture of the charter was authorized by the statutes, precedents of the Court, and the provisions of the charter itself, the Supreme Court of Tennessee, in its decision, did not depart from applicable rules of state law.

III.

No Substantial Federal Question Is Presented by the Petition.

The petition is based on the premise, which is completely false, that the Supreme Court of Tennessee, in its decision, so far departed from applicable rules of state law as to deny to petitioner due process of law and equal protection of the laws in violation of the Fourteenth Amendment.

The State Supreme Court not only based its opinion on adequate nonfederal grounds but, in so doing, it followed state precedents of long standing.

The dissolution of state-created corporations is a matter exclusively of state power. *Hopkins Fed. S. & L. Asso. v. Cleary*, 296 U. S. 315. In *Chicago T. & T. Co. v. Forty-One Thirty-Six W. Bldg. Corp.*, 302 U. S. 125, this Court said:

> ". . . There is nothing in the Federal Constitution which operates to restrain a state from terminating the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized." 302 U. S. 128.

The issues of fact were for the conclusive determination by the State Court and are not open for consideration by this Court. *Watts v. State of Indiana*, 338 U. S. 49; *Wolfe v. State of North Carolina*, 364 U. S. 177.

This Court cannot consider the correctness of the nonfederal grounds upon which the Supreme Court of Tennessee rested its decision unless there was an obvious subterfuge to evade consideration of the federal issue. *Radio Station WOW v. Johnson*, 326 U. S. 120, 129. Since the State Supreme Court in nowise departed from applicable rules of state law and its own precedents, its decision was not, and could not be, a subterfuge to evade consideration of the federal question.

The Tennessee Court, in basing its decision on adequate nonfederal grounds and in declining to adjudicate the constitutional question, followed a long established practice. *Richardson v. Young*, 122 Tenn. 471, 524; *State Bd. of A. & Ex's. v. Blalock*, 190 Tenn. 626, 631. Indeed, the same rule is consistently followed by this Court. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288; *Poe v. Ullman*, 81 S. Ct. 1752, 6 L. Ed. 2d 989.

Where the state judgment, as in the present case, is based on adequate state grounds, this Court is without

jurisdiction to pass on the question of whether the petitioner was deprived of its rights under the Constitution of the United States. *Dixon v. Duffy*, 344 U. S. 143, 146.

The writ of certiorari will not be granted as a matter of right. There must be special and important reasons for granting it. *Rice v. Sioux City Cemetery*, 349 U. S. 70. The forfeiture of a state welfare corporation charter on adequate state grounds does not involve principles of special importance to the public generally. And this is especially true where the finding of the State Supreme Court is that the corporation is being operated for the personal gain of one person, an officer of the corporation.

No substantial federal question is presented by the petition.

CONCLUSION.

The petitioner, with great zeal, urges that it does not contend it is exempt from the laws of the State of Tennessee simply because it is a racially integrated institution. And yet, as an educational institution, it complains because the Tennessee Court would not afford to it the privileges and immunities of a social club.

With great piety the petitioner asserts that it is entitled to be judged according to the same principles of Tennessee law that are applicable to other Tennessee corporations. And yet it complains because the Supreme Court of Tennessee, following its own precedents of long standing and the rule followed by this Court, based its decision on adequate state grounds and refused to decide the constitutional question.

The Supreme Court of Tennessee found as a fact that:

> ". . . the record fails to show that the school had any plan, or standard for teaching and studies and it

seems that it was operated more as a vocation work shop than as an ordinary school. The work was carried out according to the day by day, or week by week ideas of Mr. Horton."

The Fourteenth Amendment was not adopted for the purpose of protecting an individual, disguised as a corporation, from the provisions of wholesome state laws applicable to all other citizens.

The petition should be denied.

.....
GEORGE F. McCANLESS,
Attorney General of Tennessee,

.....
JACK WILSON,
Assistant Attorney General of Tennessee,

.....
ALBERT F. SLOAN,
District Attorney General for the
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Certificate of Service.

I, Jack Wilson, Assistant Attorney General of Tennessee, one of the attorneys for the respondent, State of Tennessee, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1961, I served copies of the within brief for the respondent on Highlander Folk School, the peti-

tioner, by mailing said copies in a duly addressed envelope, postage duly prepaid to its counsel of record, namely: Cecil Branstetter and George E. Barrett, 216 Third Ave. North, Nashville, Tennessee.

.....

JACK WILSON,

Supreme Court Building,
Nashville, Tennessee,
Attorney for Respondent.

APPENDIX A.

Tennessee Code Annotated.

48-1109. **Powers Restricted to Purposes for Which Created.**—The means, assets, income, or other property of the corporation shall not be employed, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation, and by no implication shall it engage in any kind of trading operation, nor hold any more real estate than is necessary for its legitimate purposes. (Acts 1875, ch. 142, § 2; Shan., § 2527; mod. Code 1932, § 4157.)

48-1110. **Profits and Dividends Prohibited.**—The general welfare of society, not individual profit, is the object for which this charter is granted, and the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members. (Acts 1875, ch. 142, § 2; Shan., § 2524; Code 1932, § 4153.)

APPENDIX B.

Excerpts From Charter of Highlander Folk School.

The particular purposes for which this charter is sought are the support of the Highlander Folk School, adult workers education, the training of rural and industrial leaders, and general academic education.

leaders, and general academic education.

The general welfare of society, not individual profit, is the object for which this charter is granted, and hence the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members.

The means, assets, income, or other property of the corporation shall not be employed directly or indirectly for any other purpose whatever than to accomplish the legitimate objects of its creation, and by no implication shall it possess the power to issue notes or currency, deal in currency, notes, or coin, buy or sell products, or engage in any kind of trading operation, nor hold any more real estate than is necessary for legitimate business.

APPENDIX C.

Tennessee Code Annotated.

23-301. **Certain Public Nuisances Defined.**—The conducting, maintaining, or engaging in the sale of intoxicating liquors; the keeping, maintaining, or conducting bawdy or assignation houses; and the conducting, operating, keeping, maintaining gambling houses in violation of the laws; in any building, structure, or place, and all means, appliances, fixtures, appurtenances, materials, and supplies used for the purpose of conducting, maintaining, or carrying on such unlawful business, occupation, game, practice, or device or houses where drunkenness, quarreling, fighting or breaches of the peace are carried on or permitted to the disturbance of others are declared to be public nuisances, and may be abated under the provisions of §§ 23-301-23-312. (Acts 1913 (2nd E. S.), ch. 2, § 1; Shan., § 5164a1; Code 1932, § 9324; Acts 1943, ch. 118, § 1; C. Supp. 1950, § 9324.)

23-313. **Unlawfully Engaging in Business or Profession.** —The carrying on, conducting, or practice of any profession, business, or occupation which is prohibited by law, unless the person so engaging in such profession, business, or occupation is in the possession of or holds a license issued by some board or other authority organized under the laws of the state, by any person not possessed of or holding the required license, is hereby declared to be a public nuisance, and the same may be abated under any procedure now provided by law for the abatement of any public nuisances, and such abatement may be accomplished by injunction. (Acts 1919, ch. 158, § 1; Shan. Supp., § 5158a1; Code 1932, § 9316.)

APPENDIX D.

Tennessee Code Annotated.

23-2801. **Grounds for Action.**—An action lies in the name of the state against the person or corporation offending, in the following cases:

(1) Whenever any person unlawfully holds or exercises any public office or franchise within this state, or any office in any corporation created by the laws of this state.

(2) Whenever any public officer has done, or suffered to be done, any act which works a forfeiture of his office.

(3) When any persons act as a corporation within this state, without being authorized by law.

(4) Or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation.

(5) Or exercise powers not conferred by law.

(6) Or fail to exercise powers conferred by law and essential to the corporate existence. (Code 1858, § 3409 (deriv. Act 1845-1846, ch. 55, § 5); Shan., § 5165; Code 1932, § 9336.)

23-2802. **Corporate Officers—Trustees.**—The action also lies to bring the directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of property intrusted to their care; to remove such officers or trustees on proof of misconduct; to prevent malversation, peculation, and waste; to set aside and restrain improper alienations of such property or funds, and to secure them for the benefit of those interested; and generally to compel faithful performance of duty. (Code

1858, § 3410 (deriv. Acts 1845-1846, ch. 55, § 8); Shan., § 5166; Code 1932, § 9337.)

23-2809. **Officers Entitled to Bring Suit.**—The suit is brought by the attorney-general for the district or county, when directed so to do by the general assembly, or by the governor and attorney-general of the state concurring. (Code 1858, § 3412 (deriv. Acts 1845-1846, ch. 55, § 5); Shan., § 5168; Code 1932, § 9339.)

23-2812. **Contents of Bill.**—The bill shall set forth briefly, and without technical forms, the grounds upon which the suit is instituted, and the suit shall be conducted as other suits in equity. (Code 1858, § 3415 (deriv. Acts 1845-1846, ch. 55, § 5); Shan., § 5171; Code 1932, § 9342.)

23-2813. **Extraordinary Process.**—The court is authorized, upon the filing of the bill, properly verified, in all proper cases, to grant attachments and injunctions, and appoint receivers to effect the ends of justice, and to make all such orders, rules, and decrees, according to the practice of a court of chancery, as may be necessary to accomplish the objects had in view. (Code 1858, § 3417 (deriv. Acts 1845-1846, ch. 55, § 8; 1851-1852, ch. 172, § 1); Shan., § 5173; Code 1932, § 9344.)

23-2814. **Answer—Evidence in Criminal Actions.**—The defendants appear and answer the bill in the usual way, and such answer shall not be read against them in any criminal prosecution brought against them, or either of them. (Code 1858, § 3418 (deriv. Acts 1845-1846, ch. 55, § 9); Shan., § 5174; Code 1932, § 9345.)

23-2815. **Issues of Fact.**—Such issues of fact as may become necessary to try by jury in the progress of the cause, shall be made up under the direction of the court, and submitted to a jury impaneled forthwith. (Code 1858, § 3416 (deriv. Acts 1845-1846, ch. 55, § 6); Shan., § 5172; Code 1932, § 9343.)

23-2816. **Judgment of Exclusion From Office or Franchise.**—When a defendant, whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise, and that he pay the costs. (Code 1858, § 3424; Shan., § 5180; Code 1932, § 9351.)

23-2817. **Judgment of Dissolution—Escheat of Corporate Property.**—If it be adjudged that a defendant corporation has by neglect, nonuser, abuse or surrender, forfeited its corporate rights, judgment will be rendered that the defendant be altogether excluded from such rights and be dissolved; and in the event the court shall find that the corporation, its stockholders, directors, officers or managers have intentionally impaired or depreciated its assets or property for the purpose of preventing the corporation from efficiently discharging its duty to the public, the property of the corporation shall escheat to the state unless its stockholders, directors, officers or managers, within a reasonable period fixed by the court, restore to the treasury of the corporation a sufficient amount of money or property to enable it to efficiently discharge its duty to the public; and also that the corporation, its directors, or managers, as the case may be, pay the costs. (Code 1858, § 3425; Shan., § 5181; Code 1932, § 9352; Acts 1949, ch. 207, § 1; C. Supp. 1950, § 9352.)

23-2821. **Appeal.**—Either party is entitled to take the case to the proper appellate court for the correction of errors, as in other chancery cases. (Code 1858, § 3430 (deriv. Acts 1845-1846, ch. 55, § 7); Shan., § 5186; Code 1932, § 9357.)

APPENDIX E.

Excerpts From the Demurrer of Highlander Folk School.

2. The bill as amended shows on its face that there is a misjoinder of causes of action in that there is an apparent attempt in the original bill to proceed to abate a nuisance under TCA 23-301 et seq., and at the same time to institute and maintain a quo warranto proceeding under TCA 23-2801, et seq.

3. Said bill shows on its face that it is an attempt to proceed under Sections 23-301–23-312 and 23-2801, et seq., TCA, which requires the use of two statutory procedures that are unknown to the forms of chancery, and cannot be maintained according to the practices or procedures in the chancery court of this state.

APPENDIX F.

Order of the Circuit Court of Grundy County, Tennessee, Granting Temporary Injunction.

Filed in my office Sept. 24th, 1959.

Florence Bouldin, Clerk.

In the Circuit Court of Grundy County, Tennessee, at Altamont.

State of Tennessee, ex rel.,
vs. } Rule No. 90.
Highlander Folk School, et al.

Order.

This cause came on to be further heard on this the 16th day of September, 1959, and prior days of the term, upon the petition of the relator, the demurrer combined with an answer of the respondent, upon oral testimony heard in open court, argument of counsel and the entire record in this cause, from all of which the Court finds, orders and decrees, as follows:

That this hearing is a hearing on a petition for a temporary restraining order as provided for in Section 23-301 et seq., TCA, and particularly as provided for in Section 23-305, TCA, and it appearing to the Court that the demurrer filed to the original petition is addressed primarily to the permanent relief sought in the original bill, and upon statement of counsel for the respondent and the State, the Court is pleased to and does reserve a ruling on said demurrer for the present time, with leave for respondent to rely thereon at the hearing.

It further appearing to the Court that respondent moved in open court to amend its answer by averring

that the Honorable G. W. Woodlee, Chancellor, had entered a decree in Minute Book 5, page 519, of the Chancery Court for Grundy County, Tennessee, on August 12, 1947, and that a copy of said decree be made Exhibit "D" to the answer previously filed, and the Court is pleased to grant the same, said motion is hereby granted.

The hearing on said petition and prayer for a temporary injunction having been heard on oral testimony on September 14, 15 and 16, 1959, and at the conclusion of the testimony and argument of counsel, the Court finds that the allegations in the petition with reference to the charges of immorality, fighting, quarreling, drunkenness and boisterous crowds has not been sustained by the proof, and the Court finds that the proof does not warrant an injunction on said grounds, but that the proof does warrant a temporary injunction based on the allegation in the petition and the proof that the respondent has been conducting, maintaining or engaging in the sale of beer and that an injunction should issue based thereon.

It Is Further Ordered, Adjudged and Decreed by the Court that the manner of handling beer on the premises of the respondent constitutes a nuisance under the laws of the State of Tennessee, particularly 23-301 TCA, and that said nuisance is hereby abated by the granting of a temporary injunction in this cause as provided for in 23-305 TCA, and that the respondent, Highlander Folk School, a non-profit general welfare corporation, is hereby enjoined from maintaining said nuisance, and that any person keeping, maintaining, aiding or abetting said corporation is hereby enjoined from the sale of beer on the premises of the respondent, Highlander Folk School, and that said corporation, its agents, servants, or employees, shall not from and after September 26, 1959, enter or use what is known as the main building or administration building of the respondent, Highlander Folk School, as the same was defined on the hearing of this cause, and as appears

in Exhibit "D" to the original petition in this cause, until the further order of this Court.

In order to enforce said injunction, the Sheriff of Grundy County shall on the 26th day of September, 1959, lock the doors of the said main school building and all State and County law enforcement officers shall be permitted to enter upon the said premises at reasonable times either day or night, and inspect same fully for evidence of any violation of such injunction until further order of this Court.

It Is Further Ordered, Adjudged and Decreed that the hearing on the petition for a permanent injunction and revocation of the corporate charter in this cause is set for the 3rd day of November, 1959, pursuant to Section 23-309, TCA.

To the action of the Court in granting the temporary injunction, ordering closed the main building above referred to, the relator excepts and the defendant excepts, and each pray an appeal to the next term of the Court of Appeals for the appropriate division of the State of Tennessee, which said appeal is for the present denied.

The costs of this proceeding to date are assessed to respondent, for which execution may issue if necessary.

O. K. for Entry:

A. A. Kelly & S. P. Raulston—Special Counsel,
A. F. Sloan,
Attorneys for Relator.

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Attorneys for Respondent.

Chester C. Chattin,
Chester C. Chattin, Judge.

APPENDIX G.

Excerpt From the Opinion of the Circuit Court of Grundy County, Tennessee.

On that date the relator moved to amend his petition by striking from the petition all prayers for injunctive relief; which amounted to nothing more than electing to proceed under the quo warranto statute seeking a revocation of the charter. The Court granted the motion to amend and overruled defendant's demurrer.

Defendant insists that the Court erred in allowing the amendment for the reason it in effect permitted relator to voluntarily dismiss the nuisance aspect of the petition. This position is not sound for the reason the nuisance aspect had been heard in September and the defendant insisted that the findings of the Court at that time were conclusive and agreed as well as insisted that the evidence adduced upon that hearing be filed and treated as evidence upon the final hearing. The dismissal of the nuisance aspect was, of course, in favor of defendant and not to its detriment. Furthermore, the Court is of the opinion that T. C. A. 23-307 applies before any hearing has been had on a nuisance petition.

Defendant insists the Court erred in overruling its demurrer especially on the grounds of misjoinder of actions and multifariousness.

Title 21. Section 607 provides: "The uniting in one bill of several matters of equity, distinct and unconnected, against one defendant, is not multifarious".

Both the nuisance and quo warranto statutes provide that both proceedings shall be tried according to the forms of Chancery.

—The amendment allowing relator to strike from his bill all prayers for injunctive relief and electing to proceed on the quo warranto aspect of the case alone cured any objection as to misjoinder of actions.

Office-Supreme Court, U.S.
FILED
SEP 26 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 279

HIGHLANDER FOLK SCHOOL, *et al.*

v.

STATE OF TENNESSEE *ex rel.* A. F. SLOAN, District Attorney General, 18th Judicial Circuit

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

REPLY MEMORANDUM OF PETITIONER

CECIL D. BRANSTETTER
GEORGE E. BARRETT
216 Third Ave. No.
Nashville 3, Tennessee
Attorneys for Petitioner

September 1961

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Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIOR OF CERTIORARI TO THE SUPREME COURT OF TENNESSOF TENNESSEE

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I

Respondent seeks to sustain the rev*ain* the revocation of Petitioner Highlander's charter on the ba*r* on the basis that Highlander has engaged in the "unlawful s*a* unlawful sale of intoxicating beverages", and that such constitute*h* constituted a violation of the liquor laws and the nuisance statut*sance* statutes of the State. It insists that the authorities relied on*es* relied on by Highlander apply only to social clubs, and have no and have no application to

transactions by educational institutions. It is clear from a reading of these cases that this suggested distinction is untenable. Those cases do not purport to hold that social clubs may engage in the sale of intoxicating liquors; rather they deal squarely with the question presented here, namely, what elements must be present in a transaction to constitute a "sale" or "trading operations" within the meaning of the relevant statutes. That this is so is demonstrated beyond doubt by the fact that the *Mountain City*, *Moriarty*, and *Dwyer* cases were simply applications of the law of Tennessee as it had originally been enunciated in a case which specifically involved an educational institution. In *State* v. *Smith*, 24 Tenn. 394, a director of a school had successfully defended himself against an attack by the State predicated on the proposition that he had failed to pay certain taxes as a merchant, engaged in trading operations, which allegedly accrued because of his furnishing items to his staff and students. It was the *Smith* case that was explicitly relied on by the Tennessee Supreme Court when it held in *Dwyer* that the activities there under attack did not involve a violation of the laws of the State of Tennessee, because such activity was not a sale or trading operation.

In the series of cases relied on by petitioner, the State Supreme Court laid down certain conditions which, when met, establish that the handling of alcoholic beverages, or other commodities, does not constitute a sale or commercial activity, and hence cannot be a violation of the liquor laws or the public nuisance laws of the State. These conditions, explicitly set forth in these cases, and all met by the petitioner, are:

1. That the corporation is organized under the general welfare laws of the State.

2. That the handling of the commodities by the corporation is incidental to its main purpose (R. pp. 1511, 1587, 782).

3. That no profit is realized by the corporation from the handling of these commodities (Highlander's system was operated at a loss, R. p. 722).

4. That the commodities are handled for the convenience and necessity of those the corporation is chartered to serve. (Highlander had these items available because many of its students were Negroes and could not purchase such items in the nearby community of Monteagle, R. pp. 722, 820, 1511-1513, 1587).

Having met all of these conditions, Highlander did not engage in a "sale" or in "commercial activities", and hence could not, consistent with the Fourteenth Amendment, be found guilty of violating the liquor laws or the nuisance statutes of the State.

II

Respondent further seeks to sustain the revocation of petitioner's charter on the basis that Highlander was found to have been operated for the personal gain of its President in violation of the statutes and its charter. The first difficulty with this position is that it overlooks the constitutional invalidity of the jury verdict upon which respondent relies. As shown in petitioner's original brief (pp. 5-8), the jury freely admitted its prejudice against petitioner, and its verdict was further infected by the introduction in evidence by respondent of inflammatory material which had no relevance to the issue before the jury.

Apart from this defect in the verdict, petitioner has pointed out that in any event charter forfeiture is not available under Tennessee law as a sanction for the

"personal gain" portion of respondent's case. In controverting this position respondent first points to the provisions of petitioner's charter. It is, however, settled Tennessee law that the inclusion or exclusion of certain provisions, not required by the statute, in a printed corporate charter add nothing to the charter in the way of granting the State the power of revocation. See *Armstrong Dulin Varnell Co.* v. *J. W. Williams, et al.*, 148 Tenn. 388; *State ex rel.* v. *Southern Publishing Assn.*, 169 Tenn. 257.

Alternatively, respondent seeks to sustain the revocation of petitioner's charter as a sanction for the allegedly improper alienation of property on the ground that the laws of Tennessee so permit, citing the case of *State ex rel.* v. *National Optical Stores Co.*, 189 Tenn. 433. In fact, that case has no bearing whatsoever here.

The provision of Tennessee law applicable to the "personal gain" portion of respondent's case is T.C.A. 23-2802 (quoted in Appendix D of respondent's brief). This statutory section has long been held to be that applicable to public corporations, *i.e.*, general welfare corporations. See *State* v. *Elliston*, 63 Tenn. 99; *State ex rel.* v. *Thompson*, 193 Tenn. 395. The section is designed

> "* * * to prevent malversation, peculation, and waste; to set aside and restrain improper alienation of such property or funds; and to secure them for the benefit of those interested, and generally to compel faithful performance of duty."

Under it the State is limited to the remedy provided by T.C.A. 23-2817, wherein it is stated:

> "* * * In the event the Court should find that the corporation, its stockholders, directors, officers or

managers, have intentionally impaired or depreciated its assets or property for the purpose of preventing the corporation from effectively discharging its duty to the public, the property of the corporation shall escheat to the State, unless the stockholders, directors, officers, or managers, within a reasonable period fixed by the Court, restore to the treasury of the corporation a sufficient amount of money or property to enable it to effectively discharge its duty to the public."

The *National Optical Stores Company* case was brought as a quo warranto proceeding under an altogether different statute, T.C.A. 23-2801, in aid of the healing art statutes of the State of Tennessee, and the fact that the sanction of charter revocation was held to be available there is simply irrelevant to the present case.

CONCLUSION

No adequate state ground supports the decision below. The petition for a writ of certiorari should be granted.

Respectfully submitted,

CECIL D. BRANSTETTER
GEORGE E. BARRETT
Attorneys for Petitioner

September 1961